



**NOTICE OF PROPOSED ADOPTION OF REGULATIONS
AND STATEMENT OF REASONS**

**California Code of Regulations
Title 2, Administration
Division 1, Administrative Personnel**

DATE: December 21, 2001

TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET

SUBJECT: Discovery Regulations in Non-Adverse Action Evidentiary Hearings
Before the State Personnel Board

AUTHORITY:

Under authority established in Government Code Section 18701, the State Personnel Board (SPB) has proposed to adopt Sections 57.1 through 57.4 to Title 2 of the California Code of Regulations, to provide procedures for conducting discovery in non-adverse action evidentiary hearings conducted before the five-member State Personnel Board (Board) or its designated representative. These discovery provisions will apply to appeals from discrimination or denial of reasonable accommodation under Government Code Sections 19700-19706, and when an appeal is granted from the Notice of Findings issued in relation to a whistleblower retaliation complaint under Government Code Sections 8547.8 and 19683. These provisions will also apply when discrimination or retaliation is raised as an affirmative defense during the course of evidentiary hearings concerning appeals from notices of adverse action under Government Code Section 19574, notices of rejection during probationary period under Government Code Section 19175, notices of medical action under Government Code Section 19253.5, and notices of non-punitive action under Government Code Section 19585.

REFERENCE:

These regulations are enacted to implement, interpret, and/or make specific Government Code Sections 8547.8, 19683, and 19700-19706.

PUBLIC HEARING:

Date and Time: February 5, 2002, from 1:45 p.m. to 2:15 p.m.
Place: Auditorium
801 Capitol Mall, Room 150
Sacramento, CA 95814
Purpose: To receive oral public comments about this action.

WRITTEN PUBLIC COMMENT PERIOD:

The public comment period for written comments will close February 4, 2002, at 5:00 p.m. This is to allow time for SPB staff to provide copies of any written comments to Board members for their consideration at the time of the hearing; however, any person may also submit written comments about the proposed changes at the hearing. To be considered by the Board, written comments must be received by Bruce Monfross at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During the 45-day written comment period, written comments may also be e-mailed to Bruce Monfross at bmonfross@spb.ca.gov or faxed to (916) 653-4256.

AVAILABILITY OF PROPOSED TEXT AND STATEMENT OF REASONS/CONTACT PERSONS:

Copies of the express terms of the proposed action, the Statement of Reasons, and all of the information upon which the proposal is based are available upon request directed to the SPB's contact person. The rulemaking file is available for review during normal business hours at the State Personnel Board, 801 Capitol Mall, Sacramento, CA 95814. Please contact Bruce Monfross at (916) 653-1403 or TDD (916) 653-1498 for additional information regarding this action. The backup agency contact for this action is Steve Unger at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, (916) 651-8461 or TDD (916) 653-1498. Questions regarding the substance of these regulations should be directed to the contact person. Questions regarding the regulatory process in conjunction with these regulations should be directed to the backup contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT:

If any substantial and sufficiently related changes are made to the text as a result of comments received during the public comment period, SPB will make the full text of the changed regulation(s) available for at least 15 days before the date the regulation is permanently amended.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

Government Code Section 18701 authorizes the Board to prescribe, amend and repeal regulations for the administration and enforcement of the Civil Service Act.

Government Code Section 8547.8 authorizes state employees or applicants for state employment to file a complaint with SPB if the employee or applicant believes that he or she has been retaliated against in employment for having engaged in whistleblowing activities.

Government Code Section 19683 authorizes SPB to investigate and conduct hearings concerning complaints of whistleblower retaliation filed by state employees or applicants for state employment.

Government Code Sections 19700-19706 authorize SPB to investigate and conduct hearings concerning discrimination complaints filed by state employees or applicants for state employment who believe they have been discriminated against on the basis of age, blindness or colorblindness, sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, mental disability, or sexual orientation.

SPB is proposing to add Sections 57.1 through 57.4 to Title 2 of the California Code of Regulations in order to:

1. Clarify which matters are subject to discovery by either party during SPB's evidentiary hearings concerning complaints or appeals from discrimination or retaliation in state service, or when discrimination or retaliation is raised as an affirmative defense during evidentiary hearings concerning notices of adverse action, notices of rejection during probationary period, notices of medical action, and notices of non-punitive action.
2. Set forth the process compelling discovery of requested discovery matters in evidentiary hearings concerning complaints or appeals from discrimination or retaliation in state service, or when discrimination or retaliation is raised as an affirmative defense during evidentiary hearings concerning notices of adverse action, notices of rejection during probationary period, notices of medical action, and notices of non-punitive action.
3. Set forth the process for quashing discovery requests in hearings concerning complaints or appeals from discrimination or retaliation in state service, or when discrimination or retaliation is raised as an affirmative defense during evidentiary hearings concerning notices of adverse action, notices of rejection during probationary period, notices of medical action, and notices of non-punitive action.

IMPACT ON SMALL BUSINESSES:

No impact on small businesses is anticipated from the implementation of the proposed amendments. Government Code Sections 8547.8, 19683, and 19700-19706 apply only to state agencies. The proposed regulations will affect only state agencies and state employees and applicants for state employment.

LOCAL MANDATE:

SPB has determined that the proposed action has no mandate upon local agencies or school districts and therefore requires no reimbursement pursuant to Section 17561 of the Government Code.

COST ESTIMATES OF PROPOSED ACTION:

Costs or Savings to State Agencies:

The proposed regulations have been created in order to clarify the procedures set forth in Government Code Sections 8547.8, 19683, and 19700-19706. It is anticipated that any additional costs that the proposed regulations may cause for state agencies will be insignificant.

Impact on Housing Costs:

The proposal will not affect housing costs.

Costs or Savings in Federal Funding to the State:

No impact.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed:

No costs to local agencies or school districts are required to be reimbursed.

Other Nondiscretionary Costs or Savings Imposed on Local Agencies:

The proposal does not impose nondiscretionary costs or savings on local agencies.

Cost Impact on Representative Private Persons or Businesses:

SPB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ASSESSMENT OF POTENTIAL ADVERSE ECONOMIC IMPACT ON BUSINESS:

SPB has made an initial determination that the proposed action will have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

ASSESSMENT REGARDING THE EFFECT ON JOBS OR BUSINESSES:

The adoption of the proposed regulations will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

DETERMINATION:

SPB must determine that no alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

SPB invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

FINAL STATEMENT OF REASONS:

It is anticipated that the proposed regulations will be filed with the Office of Administrative Law pursuant to Government Code Section 18214, under which no Final Statement of Reasons is required. If a Final Statement of Reasons is nevertheless prepared, it may be obtained from the contact person or the backup contact person when it becomes available.

ACCESSING INFORMATION REGARDING THIS RULEMAKING FILE ON THE STATE PERSONNEL BOARD WEB SITE:

The text of the proposed regulations, the Notice of Proposed Adoption of Regulations and Statement of Reasons; and if prepared and when available for review, the Final Statement of Reasons, will be on SPB's Web site at: www.spb.ca.gov.

STATEMENT OF REASONS:

Specific provisions of California's Civil Service Act (Government Code Sections 19700-19706) prohibit discrimination in state employment on the basis of one or more enumerated characteristics, and permit individuals to file complaints and/or appeals with SPB when they believe they have been discriminated against because of their membership in one or more of the enumerated classes, or if they believe they have been retaliated against for having complained of discrimination.

California's Whistleblower Protection Act (Government Code Section 8547.8) and Government Code Section 19683 also permit state employees or applicants for state employment to file complaints with SPB if they believe that they have been retaliated against for having reported improper governmental activities or for having refused to obey an illegal order or directive. These statutes authorize SPB to conduct investigations or hearings to determine whether the individual has been the victim of discrimination or retaliation in state service.

These proposed regulations are designed to clarify the discovery process that will apply to evidentiary hearings concerning such complaints or appeals, as well as when state employees raise discrimination or retaliation as an affirmative defense during the course of evidentiary hearings concerning notices of adverse action under Government Code Section 19574, notices of rejection during probationary period under Government Code Section 19175, notices of medical action under Government Code Section 19253.5, and notices of non-punitive action under Government Code Section 19585.

The proposed regulations will serve to:

1. Specify which matters and/or subjects may be subject to discovery during hearings concerning allegations of discrimination or retaliation.
2. Specify which parties may conduct discovery, and the time period in which discovery must be conducted.
3. Specify the method for parties to seek to compel discovery when the requested matter(s) are not produced in a timely fashion.
4. Specify the method for parties to seek to quash discovery requests that they believe to be improper.

Mike Willihnganz
Chief, Policy Division

Attachment: Text of Proposed Adoption of Regulations



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, California 95814

Discovery Regulations in Non-Adverse Action Evidentiary Hearings

All new text is indicated by underline. A double underline with italics indicates new text that is intended to be single underlined in the final printing.

Title 2. ADMINISTRATION

Division 1. Administrative Personnel

Chapter 1. State Personnel Board

§ 57.1 Discovery in Evidentiary Hearings Other than Adverse Actions; Exclusive Provisions.

The provisions of Sections 57.2-57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board concerning appeals from discrimination (Sections 54, 547, and 547.1), reasonable accommodation (Section 53.2), and when an appeal is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56-56.6). These provisions also apply when discrimination or retaliation is raised as an affirmative defense during the course of evidentiary hearings concerning Notices of Adverse Action, Rejections During Probationary Period, Medical Actions (Government Code Section 19253.5), and Non-Punitive Actions (Government Code Section 19585).

NOTE: Authority cited: Section 18701, Government Code.

Reference: Sections 8547.8, 19683 and 19700-19706, Government Code.

§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to the appeal is entitled to serve a request for discovery on any other party to the complaint or appeal concerning those matters set forth in subsections (c)–(e). All requests for discovery shall be made no later than **36** days prior to the initial hearing date, except upon a showing of good cause. For purposes of this section, the term “party” is defined as the person, to include appointing powers, filing the appeal, as well as any person, to include

appointing powers, specifically identified in the body of the appeal as a person beneficially interested in the outcome of the appeal.

(b) When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.

(c) Each party to the appeal is entitled to request and receive from any other party to the appeal the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, unless disclosure of the address is prohibited by law. Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing, including those witnesses designated as “experts.” The responding party may, in his or her discretion, provide either the home or business address of the witness, unless disclosure of the address is prohibited by law.

(d) Each party to the appeal is entitled to inspect and make a copy of any of the following in the possession, custody, or control of any other party to the appeal:

(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal;

(2) All writings, as that term is defined in Evidence Code Section 250, that the party then proposes to enter into evidence;

(3) Any other writing or thing that is relevant to the appeal; and

(4) Investigative reports made by or on behalf of any party to the appeal pertaining to the subject matter of the proceeding, to the extent that these reports

(A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law;

(B) reflect matters perceived by the investigator in the course of his or her investigation; or

(C) contain or include by attachment any statement or writing described in (A) or (B), or summary thereof.

(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.

(f) All parties receiving a request for discovery shall produce the information requested within 24 days prior to the initial hearing date, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production.

(g) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8, 19683 and 19700-19706, Government Code.

§ 57.3. Petition to Compel Discovery.

(a) Any party claiming his or her request for discovery pursuant to Section 57.2 has not been complied with may serve and file with the administrative law judge a petition to compel discovery, naming as responding party the party refusing or failing to comply with Section 57.2.

A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge.

(b) The petition shall state facts showing the responding party failed or refused to comply with Section 57.2, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that section, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the issue has been made, and the grounds of responding party's refusal so far as known to the moving party.

(c) The petition shall be served upon the administrative law judge and responding party within 5 *working* days after the responding party refused or failed to comply with the request, or within another time provided by stipulation, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the initial hearing date, except upon petition and determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(d) The responding party shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to compel.

(e) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not discoverable under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in subsection of subsection 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(f) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition no later than 7 days prior to the scheduled hearing date. Nothing in this section shall preclude the administrative law judge from

determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. In the event that a hearing on the petition is ordered, the decision of the administrative law judge shall be issued no later than 7 days prior to the scheduled hearing date. The administrative law judge shall decide the petition on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(g) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is entitled to discover under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by United States Mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(h) Upon the request of one or more parties to the action, the administrative law judge may, upon a showing of good cause, and in his or her discretion, continue the hearing date in order to resolve any contested discovery issues.

(i) A ruling of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. The hearing shall be continued pending resolution of any such interlocutory appeal.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8, 19683 and 19700-19706, Government Code.

§ 57.4. Petition to Quash or for Protective Order.

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that section or is otherwise privileged or exempt from discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state:

- (1) a description of the matters sought to be discovered,
- (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and
- (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

(b) The petition shall be served upon the administrative law judge and the party requesting discovery within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(c) The responding party shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition for a protective order.

(d) Where the matter sought to be protected is in the possession, custody or control of the moving party, and the moving party asserts that the matter is not discoverable under the provisions of Section 57.2, or is otherwise privileged or exempt from discovery, the administrative law judge may order lodged with him or her matters provided in subsection 915(b) of the Evidence Code and examine the matters in accordance with those provisions.

(e) Unless otherwise stipulated by the parties, and as provided in this section, the administrative law judge shall review the petition and any response filed by the responding party

and issue a decision granting or denying the petition within 7 days after the filing of the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. In the event that an evidentiary hearing on the petition is ordered, the decision of the administrative law judge shall be issued within 7 days of the closing of the hearing. The administrative law judge shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(f) The order shall be in writing and set forth the matters the moving party is not required to produce to the party seeking discovery under Section 57.2. The order shall specify the date on which all disputed documents must be produced, but in no event shall the time for production be later than 5 days prior to the hearing date, except upon a showing of good cause. A copy of the order shall be served by mail and/or by facsimile transmission by the administrative law judge upon the parties. Where the order grants the motion in whole or in part, the order shall be effective on the date it is served and shall specifically state the date on which production of the disputed information is due.

(g) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8, 19683 and 19700-19706, Government Code.